

OCT 05 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARQUIS LEE JOHNSON,

Petitioner - Appellant,

v.

ARIZONA ATTORNEY GENERAL; et
al.,

Respondents - Appellees.

No. 07-16849

D.C. No. CV-05-00613-EHC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted September 14, 2009^{**}

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Marquis Lee Johnson appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

U.S.C. §§ 1291 and 2253, and we affirm.

Johnson contends that his appellate counsel was ineffective for failing to raise on direct appeal the various claims of prosecutorial misconduct and trial court error that he raises in his § 2254 petition. Johnson admits in his petition that counsel told him she had reviewed his suggested claims and found them to be without merit, and Johnson has not demonstrated that any of these claims were viable on direct appeal. Accordingly, Johnson has failed to meet his burden of showing that appellate counsel was deficient for declining to raise his suggested claims on direct appeal, or that he suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *see also Smith v. Robbins*, 528 U.S. 259, 288 (2000) (noting that the presumption that appellate counsel acted reasonably will generally be overcome only when claims not raised are clearly stronger than those presented). The state court's decision rejecting Johnson's ineffective assistance of counsel claim was therefore not contrary to, nor an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d); *see also Strickland*, 466 U.S. at 694.

Because Johnson has not set forth any specific facts that, if proven, would entitle him to relief, he has not shown that he is entitled to an evidentiary hearing. *See Gonzalez v. Piller*, 341 F.3d 897, 903 (9th Cir. 2003).

Finally, we construe Johnson's briefing of uncertified issues as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.